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Remarks

Reconsideration of the application is respectfully requested. Claims 1, 3, 4 and 6-21 are pending.

Claim Rejections - 35 U.S.C. §103

All previously pending claims were finally rejected under 35 U.S.C. 103 as being obvious based on Wickham et al. (U.S. Patent 6,370,154) in view of Zimmermann (U.S. Patent 6,094,582). Claims 5-6 and 16 were rejected based additionally on Official Notice being taken of certain IP communications. Reconsideration is sought.

MPEP §706.02(j) states: "To establish a prima facie case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art and not based on applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991)." (Emphasis added.)

Re: Advisory Action – "Start Time"

In the Advisory Action of August 23, 2005 applicant's request for reconsideration was considered but found not to place the application in condition for allowance. One aspect of applicant's argument presented after the final rejection was summarized as arguing that Wickham does not teach a start time for making the data call. In response, the Examiner explained his interpretation of Wickham as the start of making a data call transmission as the time when the session is established between to hosts on a network. It was stated in the Advisory Action that

once the session between the hosts is established, this inherently means the time is ready for the hosts to begin the exchange of data messages across the network.

Claim 1 defines the start time as being the time at which the transfer of the data file will begin. It will be noted that the actual start of the transfer of a user's data file and the opening/establishment of a communication channel are not the same, nor equivalent to each other. For example, assume that a circuit-switched data path has been established at time T0. However, for a variety of practical reasons, a user may not desire to start the transmission of a data file over the data path until a later time, T0 + T1. There is nothing inherent about the time of the establishment of a communication path that would cause one of ordinary skill in the art to equate it to the start time of a user's data file. Hence, Wickham does not teach or suggest this limitation.

Re: Advisory Action – “Predetermined Data File Size”

Claim 1 requires determining a period of time required to transmit a user's stored data file of predetermined size from the host using the data call or the network. In the Advisory Action it was stated that Wickham, at column 7, lines 10-27, teaches the subject limitation. Applicant respectfully disagrees. In the cited text portion of Wickham, a domain model of the network is built in memory. Model objects are created and populated in the memory in response to user request. It is believed that the key phrase relied upon is "whether a memory 65 is free of adequate information pertaining to an internal structure requested by the user." It is believed that one of ordinary skill in the art would not understand the subject phrase as meaning a check on the availability of free memory. First, if a "check to make sure enough free memory was available" was intended to be described in the reference, it would have been easily stated as such in the reference. No such clear indication of this intent is stated. It appears that this phrase is concerned with the determination relating to whether adequate information relating to an internal structure requested by the user is contained in memory 65. Therefore, there is no prima facie ground found in the reference to sustain the interpretation stated in the Advisory Action.

In addition, it is common to define a set of objects where all objects have a maximum fixed size. In this situation, a check on available free memory to accept a new object to be written into memory would likely involve a query to determine if memory equal to the maximum fixed size was available. Such a query would satisfy a desire to know that sufficient memory was available, but would not inherently require that the actual size of the object to be written be known.

A reference cannot be relied upon to supply a teaching not expressly described in the reference unless it is inherent based on the stated teachings of the reference that the subject teaching must have been practiced by the embodiment described by the reference. As explained above, Wickham clearly does not provide an express description of the file size limitation, and does not describe an embodiment in which it would have been inherent that the actual file size of a user file would have been determined. Therefore, Wickham does not provide prima facie support that a predetermined size of a user's data file was known.

Re: Advisory Action – “Holding Time”

Claim 1 defines the holding time as the period of time needed to transfer the data file in the data call over the network, and that the holding time is determined prior to the sending of the set up message. This aspect of the claimed invention is said to be taught by Zimmerman.

In the Advisory Action it was stated that Zimmerman teaches maintaining a specified rate during the duration of the call, and if the rate calls below a threshold error rate, a new channel that satisfies the rate will be used for the current call. Zimmerman was further said to teach that the "holding time" is based upon call priority. This reference basically describes a priority based system in which call requests are handled based upon a priority ranking. Call requests can move up the priority tree, become a top priority call request, and then be selected for call establishment. In accordance with this reference, a holding time refers to the waiting time prior to a call request being selected to establish a call connection. Thus, Zimmerman does not supply the required teaching.

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It was further stated in the Advisory Action that: "in one embodiment, Zimmerman's holding time is based on call priority (column 7, lines 33-50). Assuming the call priority is highest among plurality of calls, the call will be held in the current state for the duration of the call without changing states." First, it is not clear to applicant why this explanation is relevant to the limitations of claim 1. Further, even if the quoted statement describes an action taken by the reference, such action does not teach or suggest a holding time as defined in claim 1. Hence, Zimmerman does not supply the required teachings of limitations found in claim 1.

Even if the references are considered in combination, the totality of the teachings of the combined references fails to teach one or more limitations of claim 1 for the reasons explained above. Hence, claim 1 is not rendered obvious under 35 U.S.C. 103 based on these references, considered individually or in combination.

Independent method claim 8 is believed to be allowable for reasons discussed above.

Independent apparatus claim 18 is likewise believed to be allowable for reasons discussed above with regard to claim 1.

Allowance of all claims pending is respectfully requested. If a telephone conference would be of assistance in advancing the prosecution of this application, the Examiner is invited to call applicants' attorney at the indicated telephone number.

Respectfully submitted,



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